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## Note

### Perception is not Reality: The FCPA, Brazil, and the Mismeasurement of Corruption\*

Stuart Vincent Campbell\*\*

*Just as a fish moving under water cannot possibly be found out either as drinking or not drinking water, so government servants employed in the government work cannot be found out while taking money for themselves. It is possible to mark the movements of birds flying high up in the sky; but not so is it possible to ascertain the movement of government servants of hidden purpose. – The Art of Politics: Kautilya<sup>1</sup>*

#### I. INTRODUCTION

The problem of corruption can be traced back to the far reaches of human history,<sup>2</sup> and has probably existed as long as government itself. Ancient philosophers such as Aristotle and Cicero discussed the problem of self-interest in the civil service.<sup>3</sup> An example of an early attempt by human society to regulate corruption through law is a medieval English rule promulgated in 1346 which prohibited judges from accepting items of value, except for small quantities of meat or drink, in order to prevent bribery.<sup>4</sup> As much as law has attempted to

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\* The *Minnesota Journal of International Law* has relied on the author for the accuracy of the Portuguese source materials.

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1. DONALD MACKENZIE BROWN, *THE WHITE UMBRELLA: INDIAN POLITICAL THOUGHT FROM MANU TO GANDHI* 58 (1964).

2. Shang-Jun Wei, *Local Corruption and the Global Economy*, NAT'L BUREAU OF ECON. RESEARCH REPORTER, Spring 2000, at 15, *available at* <http://nber.org/reporter/spring00/wei.html> (comparing the ubiquity of corruption in human history to that of cockroaches).

3. SEPPO TIIHONEN, *THE HISTORY OF CORRUPTION IN CENTRAL GOVERNMENT* 8–9 (2003).

4. *Id.*

stamp out corruption, scholars accept that it persisted on a wide scale in the United States until the early 20th Century.<sup>5</sup> In 1977, the United States took the historic step of banning its businesspeople from engaging in bribery overseas by passing the Foreign Corrupt Practices Act (FCPA).<sup>6</sup> However, enforcement was minimal for decades after FCPA passage. This was in part due to fear over the possible consequences of implementing it<sup>7</sup> in a world where many major U.S. trading partners still offered tax write-offs for bribes their companies gave to foreign officials.<sup>8</sup> More recently, international treaties have normalized the fight against business corruption.<sup>9</sup> The past ten years have seen a massive increase in FCPA enforcement.<sup>10</sup> Indeed, the early 21st Century was the first time in human history that international business people had been meaningfully threatened with legal sanction in their home-countries for promoting their companies' interests overseas through corruption and bribery.

The United States' historic effort at regulating such corruption could be considered ethically laudable,<sup>11</sup> but these

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5. See TRANSPARENCY INTERNATIONAL, GLOBAL CORRUPTION REPORT 2007: CORRUPTION IN JUDICIAL SYSTEMS 106 (2007) (referring to increased use of media as a tool to combat corruption in the United States). In this author's opinion, the case could be made that corruption had a substantial effect on United States political history well into the mid and late 20th Century. See, e.g., ROBERT CARO, MASTER OF THE SENATE: THE YEARS OF LYNDON JOHNSON (2002) (documenting Lyndon Johnson's tenure in the Senate and arguing that his ability to pass the Civil Rights Act of 1957 derived substantially from his skillful use of illegal campaign contributions, corporate slush funds, and intimidation); FRED EMERY, WATERGATE: THE CORRUPTION OF AMERICAN POLITICS AND THE FALL OF RICHARD NIXON (1995).

6. See *The International Anti-Bribery and Fair Competition Act of 1998: Hearing on H.R. 4353 Before the H. Subcomm. on Fin. and Hazardous Materials of the Comm. on Commerce*, 105th Cong. 2 (1998) (testimony of Paul V. Gerlach, Associate Director, Div. of Enforcement, U.S. Sec. and Exch. Comm.), available at 1998 WL 642491 (S.E.C.), for rationale behind the Act.

7. Courtney C. Thomas, *The Foreign Corrupt Practices Act: A Decade of Rapid Expansion Explained, Defended, and Justified*, 29 REV. LITIG. 439, 448–49 (2010).

8. FRANCIS CHERUNILAM, INTERNATIONAL BUSINESS: TEXT AND CASES 653 (4th ed. 2007) (noting that France and Germany give tax write-offs for bribes given to foreign officials to secure business overseas).

9. DR. FRÉDÉRIC WEHRLÉ, ORGANIZATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT, TAKING RESPONSIBILITY FOR WORLD CORRUPTION: OECD COUNTRIES' EXPERIENCE IN COMBATING BRIBERY AND PROMOTING TRADE AND INVESTMENT WORLD-WIDE 2–3 (2005), available at <http://www.oecd.org/investment/investmentfordevelopment/34448578.pdf>.

10. Thomas, *supra* note 7, at 449–50.

11. The United States has been called a “Boy Scout” for its ethically high–

fledgling attempts have implicated the same issue identified by Kautiliya in 4th Century B.C. India: The difficulty, or indeed impossibility, of detecting and accurately measuring corruption.<sup>12</sup> Researchers, most notably those working for the anti-corruption non-profit Transparency International, have attempted to measure corruption by using the perception of corruption as a proxy for its actual occurrence.<sup>13</sup> Though corruption perception is the most widely used and popular means of measuring corruption,<sup>14</sup> critics like Brazilian corruption researcher Claudio Weber Abramo have questioned the construct validity of measuring a country's level of corruption by measuring the level of perceived corruption attributed to it — arguing that the perception proxy “has more than run its course.”<sup>15</sup> This paper argues that the legal profession's reliance on a flawed indicator of corruption implicates a literature critical of the economic effects of the FCPA and aims to strengthen the position taken by academics who favor the addition of a “compliance defense” to the FCPA.<sup>16</sup> Though the problems discussed in this note are pervasive in present efforts to regulate international corruption, this note is built on the illustrative example of Brazil, which, unlike similarly situated countries such as China,<sup>17</sup> India,<sup>18</sup> and

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minded attempt to prevent overseas bribery because of the potentially crippling effects this could have on American businesses. *See, e.g.*, Patrick Glynn et al., Inst. for Int'l Econ., *The Globalization of Corruption*, in CORRUPTION AND THE GLOBAL ECONOMY 7, 17 (Kimberly Ann Elliot ed., 1997).

12. *See* BROWN, *supra* note 1, at 58.

13. For discussion of this issue, *see infra* Part III.

14. *Id.*

15. *Murk Meter: The best-known corruption index may have run its course*, THE ECONOMIST, Oct. 30th–Nov. 5th 2010, at 66, available at <http://www.economist.com/node/17363752>.

16. *See infra* Part II.2, for a discussion of the corporate compliance defense in the U.K. Bribery Act.

17. *See* Bruce M. Boyd, *Governmental Corruption in China: Application of the Foreign Corrupt Practices Act*, 3 SANTA CLARA J. INT'L L. 235, 235 (2004) (“[Chinese corruption] is especially problematic for companies from the United States which are prohibited from bribing governmental officials to obtain or retain business by the Foreign Corrupt Practices Act (‘FCPA’).”); Nicole Y. Hines, *Cultural Due Diligence: The Lost Diligence That Must Be Found By U.S. Corporations Conducting M&A Deals in China to Prevent Foreign Corrupt Practices Act Violations*, 9 DUQ. BUS. L.J. 19, 22 (2007) (“Certain aspects of Chinese culture, especially quanxi . . . and mianzi . . . pose a high degree of violating the Foreign Corrupt Practices Act . . .”); Hilary K. Josephs, *The Uprights and the Low-Down: An Examination of Official Corruption in the United States and the People's Republic of China*, 27

Russia,<sup>19</sup> has not been the subject of FCPA compliance research published by law journals.<sup>20</sup> The example of Brazil is

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SYRACUSE J. INT'L. L. & COM. 269, 298 (2000) (describing the different cultural understandings of what is violative gift-giving under Chinese law and the FCPA); Mike Koehler, *The Unique FCPA Compliance Challenges of Doing Business in China*, 25 WIS. INT'L L.J. 397, 397–98 (2007) (examining the intricacies of FCPA compliance for American businesses seeking to do business in China); Judith A. Lee & James D. Slear, *Unique Problems with FCPA Compliance in the People's Republic of China*, BUS. L. TODAY 15, May/June 2007, at 15 (“Common sense, therefore, dictates that PRC business plans incorporate controls to ensure that the U.S. companies and issuers and third parties working on their behalf be in compliance with the FCPA from the outset . . .”); Eric M. Pedersen, *The Foreign Corrupt Practices Act and its Application to U.S. Business Operations in China*, 7 J. INT'L BUS. & L. 13, 14 (2008) (“Given the fact that corruption in China is widespread, and the government still owns and manages the country's largest companies, compliance with the [FCPA] can be exceptionally challenging for U.S. corporations that conduct business operations in China.”); F. Joseph Warin et al., *FCPA Compliance in China and the Gifts and Hospitality Challenge*, 5 VA. L. & BUS. REV. 33, 35 (2010) (addressing the legal risks of Chinese gift and hospitality culture and presenting suggestions for structuring compliance programs); Delia Poon, Note, *Exposure to the Foreign Corrupt Practices Act: A Guide for U.S. Companies With Activities in the People's Republic of China to Minimize Liability*, 19 HASTINGS INT'L & COMP. L. REV. 327, 345 (1996) (proffering FCPA compliance measures for U.S. businesses in their dealings with China).

18. See Beverly Earle & Anita Cava, *Are Anti-Corruption Efforts Paying Off? International and National Measures in the Asia-Pacific Region and their Impact on India and Multinational Corporations*, 31 U. HAW. L. REV. 59, 78–84 (2008) (reviewing effects of the Asian Development Bank on business in India); Toral Patel, *Corrupt Practices in India: No Payoff*, 20 LOY. L.A. INT'L & COMP. L. REV. 389, 389 (1998) (“India's current anti-corruption laws are ineffective; hence, U.S. corporations find it increasingly difficult to follow the requirements of the [FCPA] while doing business in India, ‘one of the most corrupt countries in the world.’”).

19. See Scott P. Boylan, *Organized Crime and Corruption in Russia: Implications for U.S. and International Law*, 19 FORDHAM INT'L L.J. 1999, 1999 (1996) (warning U.S. businesses of the risks under both Russian and United States law of bribing Russian government officials, and warning the U.S. Government that such bribery undermines the transformation to democracy in Russia); Christopher F. Dugan & Vladimir Lechtman, *The FCPA in Russia and other Former Communist Countries*, 91 AM. J. INT'L L. 378, 378 (1997) (noting the challenge of competing effectively in Russia and complying with the FCPA); William Spiegelberger, *Russian Roulette: Doing Business in Russia in Compliance with Anti-Bribery Laws and Treaties*, 2 N.Y.U. J. L. & BUS. 819, 821 (2006) (“[C]ombination of a treacherous business environment and often murky ownership structures presents a considerable problem for foreign companies that want to do business in Russia in compliance with their domestic legislation criminalizing the bribery of foreign officials.”).

20. The most detailed existing research of FCPA compliance in Brazil treats Latin America generally and contains only two textual references to Brazil, thus doing little more than listing it as a country in the region. See Veronica Foley & Catina Haynes, *The FCPA and its Impact in Latin America*,

particularly useful for demonstrating the weakness of statistical measures of corruption because “Brazil is not easily grasped by the eagle’s eye”;<sup>21</sup> that is, Brazil is particularly difficult to comprehend through use of the grand generalizations that underlie the most popular statistical measures for corruption.

Critics of the economic effects of the FCPA have argued that the law functions as a sanction on developing countries, because it creates disincentives to invest in economies that are perceived to carry high corruption risk — most frequently developing countries in need of development capital.<sup>22</sup> The thesis of this note is that lawyers’ reliance on the highly flawed proxy of corruption perception may contribute to the economic distortion created by the FCPA — deterring investment in important developing economies such as Brazil. Part II briefly examines the most important legislation regulating American businesspeople in Brazil. Part III compares different types of statistics purporting to measure corruption in Brazil, demonstrating the wide divide between different corruption measures. Part IV investigates the corruption perception statistics commonly used by the legal community to measure FCPA compliance risk, and whether the FCPA deters American businesses from investing in developing economies. This section of the note also argues that criticisms of corruption perception statistics strengthen a broader literature, and argues for a compliance defense in the FCPA. Part V concludes.

## II. BACKGROUND ON ANTI-CORRUPTION LEGISLATION RELEVANT TO INTERNATIONAL BUSINESS IN BRAZIL

There are three sets of laws likely to be relevant to American businesses investing in Brazil: those of the United States, the United Kingdom, and Brazil itself. The FCPA and the Travel Act have both been used by the United States to punish international bribery.<sup>23</sup> The United Kingdom’s 2010

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17 CURRENTS: INT’L TRADE L.J. 27, 27 & 40 (2009).

21. Cláudio Weber Abramo, *Introduction* to TRANSPARÊNCIA BRASIL, REPORT ON BRAZIL: PRESENTED TO THE GLOBAL FORUM II ON FIGHTING CORRUPTION (2001), *available* at <http://www.transparencia.org.br/docs/GFIIReport.pdf>.

22. *See, e.g.,* Andrew Brady Spalding, *Unwitting Sanctions: Understanding Anti-Bribery Legislation As Economic Sanctions Against Emerging Markets*, 62 FLA. L. REV. 351 (2010).

23. *See infra* notes 34, 52 and 62 and accompanying text.

Bribery Act is also relevant to many American businesses because of its far-reaching jurisdictional provisions.<sup>24</sup> Finally, American businesses need to consider Brazilian law — both because host country law influences the application of the FCPA,<sup>25</sup> and also because it has been used to prosecute international businesspeople who have attempted to bribe Brazilian officials.<sup>26</sup>

# 1. U.S. LAWS REGULATING INTERNATIONAL BUSINESS CORRUPTION

In 2009, a man who represented himself as an agent of the Minister of Defense of Gabon approached sales representatives for various weapons manufacturers to offer them the opportunity to outfit his country's elite presidential guard.<sup>27</sup> In order for the transaction to go forward, he asked for a 20% commission that he claimed was legal.<sup>28</sup> In reality, the man's purported business proposal was concocted by the FBI to ensnare American business executives in an FCPA investigation.<sup>29</sup> This aggressive and proactive enforcement exemplifies the unprecedented vigor that characterizes current United States anti-corruption investigation. Most international anti-corruption prosecutions pursued by the United States are brought under the FCPA, which only bans public sector bribery. However, American businesses also need to consider the Travel Act, which has been interpreted to allow prosecutions for private sector bribery as well.<sup>30</sup>

24. See *infra* notes 63–67 and accompanying text.

25. See *infra* note 47 (using Germany's aggressive enforcement in corruption matters as example of need to coordinate with other nations to account for their interests and sovereignty).

26. See, e.g., *Hariri Probe Seeks Lebanese Banker Arrested for Bribery in Brazil*, ASSOCIATED PRESS, Mar. 14, 2006, <http://www.foxnews.com/story/0,2933,187765,00.html> (discussing a case where a bank executive was arrested for attempting to give Brazilian police a \$200,000 bribe).

27. Jeremy Pelofsky, *Mistrial in U.S. Bribery Sting After Jury Deadlock*, REUTERS, Jul. 7, 2011, <http://www.reuters.com/article/2011/07/07/us-bribery-verdict-idUSTRE7667R320110707>.

28. Christopher Norton, *Gabon FCPA Informant Says He Claimed Deal Was Legal*, LAW360 (Nov. 3, 2011), <http://www.law360.com/articles/283302>.

29. UNITED STATES DEPARTMENT OF JUSTICE, OFFICE OF PUBLIC AFFAIRS, TWENTY-TWO EXECUTIVES AND EMPLOYEES OF MILITARY AND LAW ENFORCEMENT PRODUCTS COMPANIES CHARGED IN FOREIGN BRIBERY SCHEME (Jan. 2010), available at <http://www.justice.gov/opa/pr/2010/January/10-crm-048.html> [hereinafter TWENTY-TWO EXECUTIVES].

30. See *infra* notes 60–62 and accompanying text.

The FCPA was passed in 1977 as a reaction to public outrage prompted by high profile cases of corporate corruption<sup>31</sup> and amended three times thereafter in 1988, 1994, and 1998.<sup>32</sup> The FCPA contains provisions that prohibit foreign bribery, which are enforced by the Department of Justice (DOJ), as well as requirements that companies engage in accounting practices to deter corruption, which are enforced by the Securities and Exchange Commission (SEC).<sup>33</sup> Violations of both the FCPA accounting<sup>34</sup> and bribery<sup>35</sup> provisions can lead to heavy fines for business-violators, and bribery violations by individuals can lead to time in prison.<sup>36</sup>

FCPA bribery provisions make it a crime to:

(1) “willfully”; (2) “make use of the mails or any means or instrumentality of interstate commerce,” (3) “corruptly,” (4) “in furtherance of an offer, payment, promise to pay, or authorization of the payment of any more, or offer, gift, promise to give, or authorization of the giving of anything of value to,” (5) “any foreign official,” (6) “for purposes of [either] influencing any act or decision of such foreign official in his official capacity [or] inducing such foreign official to do or omit to do any act in violation of the lawful duty of such official [or] securing any improper advantage,” (7) “in order to assist such [corporation] in obtaining or retaining business for or with, or directing business to, any person.”<sup>37</sup>

The FCPA’s accounting provisions require companies that issue securities to “make and keep books, records, and accounts, which, in reasonable detail, accurately and fairly

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31. S. REP. NO. 95–114, at 3 (1977); H.R. REP. NO. 95–640, at 5–6 (1977).

32. The content of these amendments falls outside the scope of this research, which focuses on the present-day compliance challenges faced by American companies.

33. Thomas, *supra* note 7, at 439–44.

34. See Foreign Corrupt Practices Act (FCPA), 15 U.S.C.A. § 78ff(a) (2002) (originally enacted as Act of 1977); 15 U.S.C.A. § 78m (2012) (originally enacted as Act of 1977).

35. 15 U.S.C.A. § 78dd–2 (1998); 15 U.S.C.A. § 78dd–3(e) (1998); 15 U.S.C.A. § 78ff(c) (2002).

36. 15 U.S.C. §§78dd–2(g)(2)(A) (2000).

37. United States v. Kay, 513 F.3d 432, 439–40 (5th Cir. 2007) (citing 15 U.S.C. §§78dd–2, 78ff (2000)).



reflect the transactions and dispositions of the assets of the [i]ssuer.”<sup>38</sup> The accounting provisions not only make it more difficult for companies to hide corrupt payments, but also mean that when the DOJ files a criminal complaint for violations of the anti-bribery provisions, the SEC can begin a parallel civil action, as businesses generally attempt to label bribes misleadingly in their books and records.<sup>39</sup>

The wide jurisdictional provisions of the FCPA make it an important consideration for a variety of companies whose operations are connected to the United States. The FCPA applies to real persons, businesses organized under the laws of the United States, foreign companies that issue U.S. securities,<sup>40</sup> and to any officer director, employee, or agent of any such company.<sup>41</sup> The FCPA’s jurisdiction can even reach foreign businesses or individuals that merely have bank accounts in the United States, or that discuss improper payments at a meeting in the United States.<sup>42</sup> These provisions subject many international companies to FCPA jurisdiction by way of their connections with the United States.

The last few years have seen an unprecedented increase in enforcement of the FCPA, which, for many years of its existence, was not frequently or proactively enforced.<sup>43</sup> The aggressive enforcement environment traces back to 2007, when the number of DOJ enforcement actions jumped up to nineteen from the previous year’s seven enforcement actions.<sup>44</sup> In fiscal year 2010, the DOJ imposed one billion dollars in FCPA penalties — the largest in the FCPA’s history.<sup>45</sup> The DOJ has

38. 15 U.S.C. § 78m(b)(2)(A) (2012).

39. See 15 U.S.C. § 78m(b)(2)(A) (2000); Koehler, *supra* note 17, at 411–12.

40. 15 U.S.C.A. § 78dd–1(a)(1) (1998).

41. 15 U.S.C.A. § 78dd–1(a) (1998).

42. Obiamaka P. Madubuko, *Emerging Markets: Risky Business or Golden Opportunities?*, in FOREIGN CORRUPT PRACTICES ACT COMPLIANCE ISSUES 79, available at 2010 WL 2828304 (July 2010).

43. Joseph Rosenbloom, *Here Come the Payoff Police: What’s Behind the New Boom in FCPA Enforcement Activity?*, THE AMERICAN LAWYER, May 2010, at 14, 15 (“Enforcement actions were rare until about four years ago, but the numbers have exploded since then: 40 cases filed last year, compared to 12 in 2005. . .”).

44. *FCPA and Related Enforcement Actions Chronological List 2007*, U.S. DEPT OF JUSTICE FRAUD DIVISION, <http://www.justice.gov/criminal/fraud/fcpa/cases/2007.html> (last visited Oct. 2, 2012).

45. U.S. DEPT OF JUSTICE OFFICE OF PUBLIC AFFAIRS, 11–085, DEPARTMENT OF JUSTICE SECURED MORE THAN \$2 BILLION IN JUDGMENTS

also substantially increased aggressive enforcement tactics that were rarely used in the past, including criminal prosecutions against individual executives.<sup>46</sup> The DOJ shows no signs of relenting, with FCPA enforcement continuing to be a top agency priority.<sup>47</sup>

One notable feature of the FCPA relevant to the following analysis is the absence of widely available affirmative defenses. The FCPA has no affirmative corporate “compliance” defense, like that found in the British Bribery Act discussed below, for corporations that have strong programs intended to prevent bribery.<sup>48</sup> The two affirmative defenses and “exception” that the FCPA does contain are rarely used — leading critics to call them “meaningless for FCPA defendants,”<sup>49</sup> and “useless,”<sup>50</sup> a criticism that even defenders of the FCPA essentially concede.<sup>51</sup>

The first FCPA affirmative defense says that otherwise prohibited payments are not illegal if the transfer was “lawful under the written laws and regulations of the foreign . . . country.”<sup>52</sup> This defense does little to help defendants.<sup>53</sup> Even countries where corruption is an accepted and normal practice do not explicitly condone it in written laws.<sup>54</sup> The second FCPA affirmative defense says no violation

AND SETTLEMENTS AS A RESULT OF ENFORCEMENT ACTIONS LEAD BY THE CRIMINAL DIVISION (Jan. 21, 2011), *available at* <http://www.justice.gov/opa/pr/2011/January/11-crm-085.html>.

46. *Examining Enforcement of the Foreign Corrupt Practices Act: Hearing Before the S. Subcomm. on Crime and Drugs of the Comm. on the Judiciary*, 111th Cong. 1 (2010) (statement of Greg Andres, Acting Deputy Assistant, Att’y Gen. of the United States), *available at* <http://www.scribd.com/doc/44435824/Prepared-Statement-of-Greg-Andres-DOJ-Senate-Hearing-Examining-Enforcement-of-the-FCPA-Nov-30-2010>.

47. Bruce Carton, *The Summer of FCPA*, COMPLIANCE WEEK, Jun. 14, 2011, <http://www.complianceweek.com/pages/login.aspx?returl=/the-summer-of-fcpa/article/204856/>.

48. Jacqueline L. Bonneau, *Combating Foreign Bribery: Legislative Reform in the United Kingdom and Prospects for Increased Global Enforcement*, 49 COLUM. J. TRANSNAT’L L. 365, 399–400 (2011).

49. Kyle P. Sheahen, *I’m Not Going to Disneyland: Illusory Affirmative Defenses Under the Foreign Corrupt Practices Act*, 28 WIS. INT’L L.J. 464, 464 (2010).

50. *Id.* at 466

51. Thomas, *supra* note 7, at 447 (“This second affirmative defense has been increasingly invoked by defendants, though not necessarily with any measure of success. Defendants do not seem to invoke the ‘lawful under the laws’ defense commonly.”).

52. 15 U.S.C. §§ 78dd–1(c)(1), –2(c)(1), –3(c)(1) (1998).

53. Sheahen, *supra* note 49, at 472–74.

54. *Id.* at 470.

occurs when a payment is made for a “reasonable” and “bona fide expenditure” that was directly related to the “promotion, demonstration, or explanation of products or services or the execution or performance of a contract with a foreign government or agency thereof.”<sup>55</sup> While some defendants do try to invoke this defense, the DOJ has a very strong track record arguing against such claims.<sup>56</sup> Finally, the FCPA does not apply to “facilitation payments” made to speed up routine governmental action,<sup>57</sup> but this exception has been read very narrowly by courts. In effect, it does not even apply to the majority of international business transactions that implicate the FCPA.<sup>58</sup>

Another notable feature of the FCPA, which is especially interesting in light of the following analysis of the Bribery Act, is that the FCPA only prohibits the bribery of public-sector recipients. Another U.S. law, the Travel Act, broadly prohibits the use of “interstate or foreign commerce or any facility in interstate or foreign commerce . . . with intent to . . . promote, manage, establish, carry on or facilitate the promotion, management, establishment, or carrying on, of any unlawful activity”<sup>59</sup> found on a list of state-law crimes that includes bribery.<sup>60</sup> Though the Travel Act was originally intended as a tool to fight organized crime in the United States, the DOJ has begun to use it to supplement FCPA prosecutions and has argued that the Travel Act can be used as a stand-alone tool to prosecute companies for private-sector bribery, even in cases not covered by the FCPA.<sup>61</sup> Therefore, even though the FCPA does not technically prohibit bribery of foreign businesspeople, the American scheme of anti-corruption legislation does ban such activities.

55. Foreign Corrupt Practices Act of 1977, Pub. L. No. 100-418, § 5003(a), 102 Stat. 1107 (amended 1988) (codified in 15 U.S.C. §§78dd-1(c)(2), -2(c)(2), -3(c)(2) (2000)).

56. Sheahen, *supra* note 49, at 484-86.

57. 15 U.S.C. §§ 78dd-1(b), -2(b), -3(b) (1998).

58. Harry L. Clark & Jonathan W. Ware, *Limits on International Business in the Petroleum Sector: CFIUS Investment Screening, Economic Sanctions, Anti-Bribery, and Other Measures*, 6 TEX. J. OIL & ENERGY L. 75, 112 (2010-2011).

59. Travel Act, 18 U.S.C. § 1952(a)(3) (2002).

60. 18 U.S.C. § 1961(1)(B) (2006).

61. John Hillebrecht & Kiera Gans, *FCPA Defense Complicated by Travel Act*, CORPORATE SECRETARY (Oct. 20, 2010), <http://www.corporatesecretary.com/articles/fcpa/11389/fcpa-defense-complicated-travel-act/>.

## 2. THE U.K. BRIBERY ACT OF 2010

In July 2011 the Bribery Act 2010 came into effect, repealing all of the United Kingdom's previous statutory and common law provisions related to bribery,<sup>62</sup> and replacing them with a new broad scheme which, unlike the FCPA, applies to both the private and public sectors.<sup>63</sup> Though the Bribery Act has been called the "toughest anti-corruption legislation in the world,"<sup>64</sup> it does contain an affirmative defense for compliance. Like the FCPA, the Bribery Act applies worldwide, and its jurisdictional provisions are broadly drafted so that any business with ties to the United Kingdom must consider its prohibitions when designing its anti-corruption legal compliance program.<sup>65</sup> The Bribery Act bans bribing, being bribed, bribery of foreign public officials, and failure of commercial organizations to prevent bribery.<sup>66</sup> Individuals convicted under the Bribery Act can face an uncapped fine as well as up to ten years in prison, and organizations convicted of failure to prevent bribery face an uncapped fine.<sup>67</sup>

The broad jurisdictional scope of some offenses in the Bribery Act makes it an important part of the regulatory scheme that American businesses should consider when formulating an anti-corruption compliance program. For American companies, the most relevant offense is the "failure of commercial organizations to prevent bribery," which can be prosecuted "irrespective of whether the acts or omissions which form part of the offense take place in the United Kingdom or

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62. Bribery Act, 2010, c. 23, § 17 (U.K.), *available at* <http://www.legislation.gov.uk/ukpga/2010/23/section/17>; *see also* THE CROWN PROSECUTION SERVICE, BRIBERY ACT 2010: JOINT PROSECUTION GUIDANCE OF THE DIRECTOR OF THE SERIOUS FRAUD OFFICE AND THE DIRECTOR OF PUBLIC PROSECUTIONS (Mar. 30, 2011), *available at* [http://www.cps.gov.uk/legal/a\\_to\\_c/bribery\\_act\\_2010/#a01](http://www.cps.gov.uk/legal/a_to_c/bribery_act_2010/#a01) (prior regulation of bribery in the U.K. included the Public Bodies Corrupt Practices Act of 1889 and the Prevention of Corruption Act of 1906) [hereinafter JOINT PROSECUTION].

63. Bribery Act, 2010, c. 23, § 3 (U.K.), *available at* [www.legislation.gov.uk/ukpga/2010/23/contents](http://www.legislation.gov.uk/ukpga/2010/23/contents).

64. Curtis C. Verschoor, *U.K. Bribery Act Offers Best Practices for Preventing Corruption*, BUSINESS FINANCE (Sept. 9, 2011), <http://businessfinancemag.com/article/uk-bribery-act-offers-best-practices-preventing-corruption-0909>.

65. *See supra* notes 63–64 and accompanying text; JOINT PROSECUTION, *supra* note 62, § 3.

66. JOINT PROSECUTION, *supra* note 62, § 3.

67. Bribery Act, 2010, c. 23, § 11 (U.K.), *available at* <http://www.legislation.gov.uk/ukpga/2010/23/contents>.

elsewhere.”<sup>68</sup> The Act applies these provisions to organizations incorporated under the law of any part of the United Kingdom, or any foreign company that “carries on a business, or part of a business, in any part of the United Kingdom.”<sup>69</sup> The Bribery Act does not define the vague “carries on a business” language and British Ministry of Justice (MOJ) commentary has not explained exactly what activities would subject a company to the Bribery Act’s strictures.<sup>70</sup> As a result of the jurisdictional reach of the Bribery Act, a great number of American companies with British operations need to revise their FCPA compliance programs to account for the Bribery Act’s provisions.<sup>71</sup>

American companies might also fall within the Bribery Act’s jurisdictional scope of the offenses of bribery, accepting a bribe, and bribing of foreign public officials even though the Bribery Act only grants jurisdiction for these crimes when a portion of the offense takes place in the United Kingdom or portions of the offense are committed by individuals with a “close connection” to the United Kingdom such as citizens, residents, and businesses organized under British law.<sup>72</sup> Therefore, even some companies with no British operations may be subject to the Bribery Act’s wide jurisdictional reach.

Importantly, the Bribery Act criminalizes the failure of commercial organizations to prevent bribery.<sup>73</sup> The Bribery Act

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68. *Id.* §§ 7(7), 12(6).

69. *Id.* § 7(5)(b).

70. MINISTRY OF JUSTICE, BRIBERY ACT 2010: CIRCULAR 2011/05 para. 22 (June 27, 2011), *available at* <http://www.justice.gov.uk/downloads/publications/circulars/bribery-act-2010-circular-2011-5.pdf> (explaining that the phrase “carries on a business” should be interpreted with a “common sense approach”).

71. The MOJ has not clarified exactly what British business presence will leave a company subject to the Bribery Act, but they have said that having stocks listed on the London Stock Exchange or owning a British subsidiary will not make a company subject to the act. MINISTRY OF JUSTICE, THE BRIBERY ACT 2010: GUIDANCE ABOUT PROCEDURES WHICH RELEVANT COMMERCIAL ORGANIZATIONS CAN PUT INTO PLACE TO PREVENT PERSONS ASSOCIATED WITH THEM FROM BRIBING para. 36 (Mar. 2011), *available at* <http://www.justice.gov.uk/downloads/guidance/making-reviewing-law/bribery-act-2010-guidance.pdf> [hereinafter GUIDANCE].

72. MINISTRY OF JUSTICE, BRIBERY ACT 2010: CIRCULAR 2011/05 para. 9 (June 27, 2011), *available at* <http://www.justice.gov.uk/downloads/publications/circulars/bribery-act-2010-circular-2011-5.pdf>.

73. Bribery Act, 2010, c. 23, § 7(1) (U.K.), *available at* <http://www.legislation.gov.uk/ukpga/2010/23/contents> (“A relevant commercial organisation [sic] (“C”) is guilty of an offence [sic] under this section if a person

states that a business is guilty of an offence if a person “associated with” a business bribes another person intending to “obtain or retain business” for the company or to “obtain or retain an advantage in the conduct of business.”<sup>74</sup> The statute states that a person is culpable only if their actions would make them guilty of the offense of bribery or bribery of a foreign official.<sup>75</sup> The Ministry has stated that a person or entity is “associated” with a commercial organization if they “perform services” for or on behalf of the organization, including employees, agents, and subsidiaries are included.<sup>76</sup> Even contractors or suppliers can be considered “associated” when they perform services on behalf of an organization.<sup>77</sup>

According to the Bribery Act, a person is guilty of bribing another person if they “promise or give a financial or other advantage to another person” with the intention to “induce a person to perform improperly a relevant function or activity,” or to reward them for the improper performance of such a function or activity,<sup>78</sup> in either the public or the private sector.<sup>79</sup> A person is also guilty of bribing if they give or promise an advantage to another person, knowing that accepting the advantage “would itself constitute improper performance of a relevant function or activity.”<sup>80</sup> Similarly, a person is guilty of accepting a bribe under Section 2 if they request, agree to receive, or accept a “financial or other advantage”<sup>81</sup> when it is intended that any improper performance follow as a consequence of the request, when the acceptance of such an advantage is itself improper, or when the advantage is given as a reward for improper performance.<sup>82</sup> The MOJ has said that this potentially broad language will not be used to pursue

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(“A”) associated with C bribes another person intending— (a) to obtain or retain business for C, or (b) to obtain or retain an advantage in the conduct of business for C.”).

74. *Id.*

75. See *infra* notes 78–87, and accompanying text for discussion of the elements of these crimes.

76. GUIDANCE, *supra* note 71, at para. 37.

77. *Id.* at para. 38.

78. Bribery Act, 2010, c. 23, § 1(2) (U.K.), available at <http://www.legislation.gov.uk/ukpga/2010/23/contents>.

79. GUIDANCE, *supra* note 71, at para. 18.

80. Bribery Act, 2010, c. 23, § 1(3) (U.K.), available at <http://www.legislation.gov.uk/ukpga/2010/23/contents>.

81. *Id.* § 2(1–8).

82. Bribery Act, 2010, c. 23, Explanatory Notes, § 2, para. 22 (U.K.), available at [www.legislation.gov.uk/ukpga/2010/23/notes/division/5/2](http://www.legislation.gov.uk/ukpga/2010/23/notes/division/5/2).

prosecutions against individuals who give items of value as a part of a legitimate “public relations exercise designed to cement good relations.”<sup>83</sup> The Bribery Act has a separate section prohibiting the giving of bribes to a “foreign public official,” defined as someone who “holds a legislative, administrative or judicial position of any kind,” or who exercises a public function for a public agency or public enterprise in that country.<sup>84</sup> Under Section 6, a person is considered to have bribed if they offer, promise, or give any financial or other advantage either directly or indirectly<sup>85</sup> with the intention to obtain or retain some sort of business advantage.<sup>86</sup> Unlike the offenses of bribery and accepting a bribe, no showing of an intended “improper performance” is required to show bribery of a public official – meaning that, like the FCPA, the Bribery Act requires businesses to be especially careful when dealing with foreign government agents.<sup>87</sup>

For the purpose of this paper, the most notable part of the Bribery Act is the inclusion of a “compliance defense.” The Bribery Act includes several different affirmative defenses. Most fall outside the scope of this paper because they are not likely to be consistently relevant to American businesses.<sup>88</sup> However, the Bribery Act’s provision for a “compliance defense” economically states: “it is a defense for [a corporation] to prove that [the corporation] had in place adequate procedures designed to prevent persons associated with [the corporation] from undertaking such conduct.”<sup>89</sup> Though the Bribery Act itself does nothing to define “adequate,” it does require the MOJ to release a compliance guideline.<sup>90</sup> Current MOJ

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83. GUIDANCE, *supra* note 71, at para. 20.

84. Bribery Act, 2010, c. 23, § 6(5) (U.K.), available at <http://www.legislation.gov.uk/ukpga/2010/23/contents>.

85. *Id.* § 6(3).

87. GUIDANCE, *supra* note 71, at para. 23.

87. GUIDANCE, *supra* note 71, at para. 23.

88. See Bribery Act, 2010, c. 23, § 13 (U.K.), available at <http://www.legislation.gov.uk/ukpga/2010/23/contents> (establishing an affirmative defense for bribery conducted in the course of espionage); GUIDANCE, *supra* note 71, at para. 48 (indicating the MOJ intends to recognize the defense of duress).

89. Bribery Act, 2010, c. 23, § 7(2) (U.K.), available at <http://www.legislation.gov.uk/ukpga/2010/23/contents>.

90. Section 9 requires the Secretary of State, who heads the Ministry of Justice, to publish guidance about procedures that commercial organizations can use to prevent their employees from bribing, and may revise these procedures “from time to time.” *Id.* § 9.

guidance calls for a program based on six principles: compliance programs designed to account for the size and nature of the bribery risk,<sup>91</sup> “top-level commitment” within the company to eliminating bribery,<sup>92</sup> periodic documentation of risk-assessments,<sup>93</sup> due diligence research on all associated persons businesses,<sup>94</sup> internal and external communication and training regarding the organization’s anti-corruption policy,<sup>95</sup> and monitoring and reviews based on observed problems to make changes based on any problems encountered.<sup>96</sup>

### 3. BRAZILIAN ANTI-CORRUPTION LAW

Brazil is a signatory to various international anti-corruption agreements including the Organization for Economic Co-operation and Development Anti-Bribery Convention, United Nations Convention Against Corruption, and the Organization of American States Inter-American Convention Against Corruption.<sup>97</sup> Brazil has strong anti-corruption laws which prohibit a wide variety of corrupt acts.<sup>98</sup> Though Brazil is still grappling with serious corruption problems, this recent legislation has substantially strengthened the fight against corruption in politics.

Brazil has a substantial historical problem with political corruption, which was accepted by Brazilians for much of the 20th Century.<sup>99</sup> Indeed, supporters of Adhemar de Barros, governor of São Paulo state during the 1960s, defended him from accusations of corruption by proclaiming, “He steals, but he makes things happen,” a saying that became an unofficial

91. GUIDANCE, *supra* note 71, at paras. 1.1–1.7.

92. *Id.* at paras. 2.1–2.4.

93. *Id.* at paras. 3.1–3.6.

94. *Id.* at paras. 4.1–4.6.

95. *Id.* at paras. 5.1–5.8.

96. *Id.* at paras. 6.1–6.4.

97. UNITED NATIONS OFFICE ON DRUGS AND CRIME, UNCAC SIGNATURE AND RATIFICATION AS OF 12 JULY 2012 (2012), *available at* <http://www.unodc.org/unodc/en/treaties/CAC/signatories.html>; JOINT VENTURES IN THE INTERNATIONAL ARENA 117 (Darrell Prescott & Salli A. Swartz eds., 2d ed. 2010).

98. Decreto No. 2.848, de 1940, arts. 332, 333, 337-B, 337-C, DIÁRIO OFICIAL DA UNIÃO de 31.12.1940 (Braz.); Decreto No. 9.613, de 1998, DIÁRIO OFICIAL DA UNIÃO de 4.3.1998 (Braz.).

99. CLÁUDIO WEBER & BRUNO WILHEM SPECK, NATIONAL INTEGRITY SYSTEMS, COUNTRY STUDY REPORT: BRAZIL 2001 17 (2001), *available at* [http://www.transparency.org/policy\\_research/nis/nis\\_reports\\_by\\_country](http://www.transparency.org/policy_research/nis/nis_reports_by_country).



campaign slogan for de Barros.<sup>100</sup> However, Brazil has recently passed numerous laws that address the issue of political corruption, including a freedom of information act that requires disclosure of public spending, and a law that bans politicians with criminal records from running for office.<sup>101</sup> These laws enjoy widespread public support among voters who oppose government corruption.<sup>102</sup> Furthermore, Projecto de Lei 6826/2010, a bill proposed by the executive in 2010,<sup>103</sup> would create corporate liability for companies whose agents bribe on a company's behalf.<sup>104</sup>

In keeping with its international treaty obligations to fight corruption, Brazil has passed laws that prohibit various corrupt acts. As previously noted, it is important for American businesspeople to know that civil servants in Brazil are prohibited from participating in "passive corruption" by soliciting or accepting any "undue advantage."<sup>105</sup> Brazilian law also bans "active corruption," the giving or promising of an "undue advantage" to a public servant to cause them to make, omit, or delay any official act.<sup>106</sup> Brazil, like the United States, bans bribes to foreign public officials.<sup>107</sup> There are also prohibitions on various practices connected with bribery including the "traffic of influence" both within Brazil,<sup>108</sup> and in the context of international business transactions.<sup>109</sup> Other

100. *Id.* at 27 n.40.

101. Stuart Grudgings, *Analysis: Brazil's Rousseff Rides Anti-Graft Wave, For Now*, REUTERS, Nov. 7, 2011, available at <http://www.reuters.com/article/2011/11/07/us-brazil-corruption-idUSTRE7A63G420111107>.

102. *Id.* (noting that an anti-corruption bill passed after 1.5 million Brazilians signed a petition in support).

103. Câmara dos Deputados do Brasil, *Projetos de Leis e Outras Proposições PL 6826/2010*, (18/12/2010), available at <http://www.camara.gov.br/proposicoesWeb/fichadetramitacao?idProposicao=466400>.

104. As of the date of publication the proposal appears as though it may be stalled in a special committee of the Brazilian Câmara dos Deputados. Agência Câmara de Notícias, *Cancelada votação do parecer sobre projeto da Lei Anticorrupção*, (13/06/2012), available at <http://www2.camara.gov.br/agencia/noticias/POLITICA/419795-CANCELADA-VOTACAO-DO-PARECER-SOBRE-PROJETO-DA-LEI-ANTICORRUPCAO.html>.

105. Decreto No. 2.848, de 1940, art. 317, DIÁRIO OFICIAL DA UNIÃO de 31.12.1940 (Braz.).

106. *Id.* at art. 333.

107. *Id.* at arts. 337-B, -C.

108. *Id.* at art. 332.

109. *Id.* at art. 337-C.

laws prohibit laundering money gained through political corruption, and make it illegal to otherwise conceal or disguise the true nature, origin, location, disposition, movement, or ownership of assets.<sup>110</sup> Although Brazil has had problem implementing these laws,<sup>111</sup> it does have a framework in place through which to prohibit bribery and has even prosecuted several domestic politicians.<sup>112</sup> The problem is one of implementation, rather than legislation.<sup>113</sup>

### III. DATA ON CORRUPTION IN BRAZIL

Quality measures of corruption are important for American lawyers because companies should consider country risks when formulating their FCPA compliance programs.<sup>114</sup> The British MOJ guidance even explicitly instructs businesses subject to the Bribery Act to consider “country risk” in formulating a proportionate compliance program.<sup>115</sup> Furthermore, there are transnational legal NGOs devoted to documenting and comparing corruption between nations and suggesting policy changes.<sup>116</sup> Lawyers, businesses, and legal NGOs all need accurate data on corruption or their work may be less effective

110. Decreto No. 9.613, de 1998, DIÁRIO OFICIAL DA UNIÃO de 4.3.1998 (Braz.).

111. Although Brazil is one of 38 countries that has ratified the OECD Antibribery Convention, it has been accused of not doing enough to enforce its anti-bribery laws. See Fritz Heimann & Gillian Dell, *Progress Report 2010: Enforcement of the OECD Anti-Bribery Convention*, TRANSPARENCY INTERNATIONAL (2010), available at [http://archive.transparency.org/publications/publications/conventions/oecd\\_report\\_2010](http://archive.transparency.org/publications/publications/conventions/oecd_report_2010).

112. Brazil recently convicted two politicians of corruption charges, though there are many more that merit prosecution – a problem that the article suggests will be partially addressed by recent legal changes. *Cleaning Up: A Campaign Against Corruption*, ECONOMIST, July 10, 2010, at 36, available at <http://www.economist.com/node/16542611>.

113. Roger M. Witten et. al., *Prescriptions for Compliance with the Foreign Corrupt Practices Act: Identifying Bribery Risks and Implementing Anti-Bribery Controls in Pharmaceutical and Life Sciences Companies*, 64 BUS. LAW. 691, 691 (2009).

114. Roger M. Witten et. al., *Prescriptions for Compliance with the Foreign Corrupt Practices Act: Identifying Bribery Risks and Implementing Anti-Bribery Controls in Pharmaceutical and Life Sciences Companies*, 64 BUS. LAW. 691, 691 (2009).

115. GUIDANCE, *supra* note 71, at para. 25, available at <http://www.justice.gov.uk/downloads/guidance/making-reviewing-law/bribery-act-2010-guidance.pdf>.

116. See, e.g., TRANSPARENCY INT’L, <http://www.transparency.org/> (last visited Oct. 2, 2012).

or even counterproductive. This need for accurate information is problematic because those engaged in corruption endeavor to conceal their activities. Researchers attempting to generate cross-country comparisons of corruption have struggled with the impossibility of directly measuring the activity<sup>117</sup> and have been forced to rely on various proxies for calculating the actual occurrence of corruption.<sup>118</sup> The most popular way to measure corruption has been to measure perceptions of corruption.<sup>119</sup> Data on Brazil indicates that it is perceived to be quite corrupt,<sup>120</sup> but other corruption proxies give researchers reason to suspect that in the case of Brazil, perception may not correspond with reality in any substantial way.<sup>121</sup>

#### 1. PERCEIVED CORRUPTION DATA FOR BRAZIL

The most popular measures of corruption are Transparency International's Corruption Perceptions Index, PRS Group's International Country Risk Guide, and the World Bank's Governance Indicators Database.<sup>122</sup> All these studies share a common methodology — the use of opinion data to compare corruption between nations. All of these measures indicate that Brazil is perceived to be a country with very corrupt public institutions,<sup>123</sup> which is to be expected since the three measures correlate strongly with each-other.<sup>124</sup>

Transparency International's Corruption Perceptions Index aggregates third-party polls on public perceptions of the levels of corruption in different countries.<sup>125</sup> According to the

117. Jakob Svensson, *Eight Questions about Corruption*, 19 J. ECON. PERSP. 19, 19–21 (2005).

118. More recent measures have tried to indirectly measure corruption by measuring its opposite: the strength of a nation's institutions to prevent corruption. See Dilyan Donchev & Gergely Ujhelyi, *Do Corruption Indices Measure Corruption?* 4 (Mar. 25, 2007) (unpublished manuscript), [http://www.cj-resources.com/CJ\\_Corrections\\_pdfs/Do%20Corruption%20Indices%20Measure%20Corruption%20-%20Dilyan%20et%20al%202007.pdf](http://www.cj-resources.com/CJ_Corrections_pdfs/Do%20Corruption%20Indices%20Measure%20Corruption%20-%20Dilyan%20et%20al%202007.pdf); Daniel Kaufmann, et al., *Measuring Corruption: Myths and Realities*, DEV. OUTREACH (Dec. 2006), [www.devoutreach.com](http://www.devoutreach.com).

119. *Id.* at 4.

120. See *infra* notes 126–127 and accompanying text.

121. See Daniel Treisman, *What Have We Learned About the Causes of Corruption from Ten Years of Cross-National Empirical Research?*, 10 ANNU. REV. POL. SCI. 211, 219 (2007).

122. Donchev, *supra* note 118, at 4.

123. See *infra* notes 124, 129, 133 and accompanying text.

124. Treisman, *supra* note 121, at 213.

125. Transparency Int'l, *Corruption Perceptions Index 2010*, 4 (2010),

2010 Global Corruption Report, Brazil has a “serious corruption problem.”<sup>126</sup> It ranked sixty-ninth highest on the Corruption Perceptions Index among the 178 countries covered by the report.<sup>127</sup> Transparency International has also released a Bribe Payers Index (BPI), which asks businesspeople about their perception of the likelihood that foreign firms from various countries will offer bribes.<sup>128</sup> The 2008 BPI ranked Brazil a 7.7 on a scale of zero to ten with higher scores indicating lower likelihood of offering bribes abroad.<sup>129</sup> This deceptively high score actually places Brazil in the second most corrupt cluster of countries discussed in the report.<sup>130</sup>

The International Country Risk Guide (ICRG), compiled by the private research company PRS Group, includes numerical rankings based on various political, financial, and economic risks as perceived by the group’s experts.<sup>131</sup> One factor in the ICRG’s assessment of political risk is an assessment of corruption on a six-point scale with higher scores indicating a lower risk of corruption.<sup>132</sup> This score includes the risk of demands for special payments or bribes for licenses, tax assessments and police protection, but focuses on “patronage, nepotism, job reservations, ‘favor-for-favors’, secret party funding, and suspiciously close ties between politics and business.”<sup>133</sup> ICRG data for January 2011 rates Brazil’s corruption risk at three out of a possible six points,<sup>134</sup> indicating that Brazil is perceived to have a serious problem

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available at [http://files.transparency.org/content/download/132/531/2010\\_CPI\\_EN.pdf](http://files.transparency.org/content/download/132/531/2010_CPI_EN.pdf).

126. Countries are scored from zero (highly corrupt) to ten (very clean) with scores below five considered to indicate a “serious corruption problem.” Transparency Int’l, *Annual Report 2010*, 78 (Alice Harrison & Michael Sidwell eds., 2010).

127. *Id.*

128. Deborah Hardoon & Finn Heinrich, TRANSPARENCY INT’L, *Bribe Payers Index 2011*, 2 (2011), available at <http://bpi.transparency.org/bpi2011/results/>.

129. *Id.* at 5.

130. *Id.*

131. See *ICRG Methodology, International Country Risk Guide*, PRS GRP., [http://www.prsgroup.com/ICRG\\_Methodology.aspx](http://www.prsgroup.com/ICRG_Methodology.aspx) (last visited Oct. 2, 2012).

132. *ICRG Methodology, The Political Risk Rating*, PRS GRP., [http://www.prsgroup.com/ICRG\\_Methodology.aspx](http://www.prsgroup.com/ICRG_Methodology.aspx) (last visited Oct. 2, 2012) [hereinafter *Political Risk Rating*].

133. *Id.*

134. *Table 3B: Political Risk Points by Component – January 2011*, PRS GRP., <http://www.prsgroup.com/PDFS/sT3B.xls> (last visited Oct. 2, 2012).

with corruption in its public institutions.<sup>135</sup>

The World Bank's Governance Indicators Database aggregates various organizational, individual, and expert survey responses to assign a numerical value to the quality of countries' governance.<sup>136</sup> One of the governance quality indicators tracked by the World Bank is control of corruption which "reflects perceptions of the extent to which public power is exercised for private gain, including both petty and grand forms of corruption, as well as 'capture' of the state by elites and private interests."<sup>137</sup> Scores for corruption range from approximately—2.5 for weak anti-corruption measures to 2.5 for strong government performance against corruption.<sup>138</sup> The 2010 Governance Indicators Database gives Brazil a score of 0.056112, which puts Brazil in the fifty-ninth percentile for its perceptions of effectiveness of anti-corruption measures.<sup>139</sup>

## 2. NON-PERCEPTION-BASED INDICATORS OF CORRUPTION IN BRAZIL

Some researchers have sought to develop alternate measures for corruption out of concerns that perception may not be a good proxy for reality.<sup>140</sup> One alternative is to study experiences with corruption, instead of perceptions of corruption.<sup>141</sup> Studies using this approach have found little correlation between a country's corruption perception score and the experience of corruption,<sup>142</sup> instead finding the relationship between perception and experience to be random.<sup>143</sup> Studies

135. *Political Risk Rating*, *supra* note 132 (noting that getting a score around half of the total points indicates "very high risk").

136. *The Worldwide Governance Indicators (WGI) Project*, World Bank, <http://info.worldbank.org/governance/wgi/index.asp> (last visited Oct. 2, 2012).

137. *Id.*

138. *Id.*

139. *Id.*

140. See Treisman, *supra* note 121, at 211–14; see also Svensson, *supra* note 116, at 207–30; see generally Naci Mocan, *Corruption, Corruption Perception, and Economic Growth*, in ECONOMIC PERFORMANCE IN THE MIDDLE EAST AND NORTH AFRICA: INSTITUTIONS, CORRUPTION, AND REFORM 38, 38 (Serdar Sayan ed., 2009) (creating aggregate-country level-corruption index from survey micro data set over 90,000 individuals in 49 countries).

141. Donchev, *supra* note 118, at 8–10.

142. See Treisman, *supra* note 121, at 214–17.

143. Claudio Weber Abramo, *How Much Do Perceptions of Corruption Really Tell Us?*, 2 ECON.: OPEN-ACCESS, OPEN-ASSESSMENT E-J., Feb. 12, 2008, at 5, <http://www.economics-ejournal.org/economics/journalarticles/2008-3>.

measuring the experience of corruption in Brazil have found the experience of corruption to be lower than the perception statistics would predict. For example, in response to extensive criticism of its CPI, Transparency International released a Global Corruption Barometer (GCB) that includes a section asking respondents whether they had personally been expected to or paid a bribe to a government service provider in the past year. The 2010 GCB found that only 4% of Brazilians had paid a bribe, which is a lower percentage of bribe-givers than the survey found in the United States or any other country in Latin America.<sup>144</sup> Other studies have used the United Nations' Interregional Crime and Victimization Survey to generate transnational comparisons of the corruption experience,<sup>145</sup> but these studies have only examined relatively old data for Brazil,<sup>146</sup> and are therefore not included in this analysis.

#### IV. THE MISUSE OF CORRUPTION STATISTICS BY AMERICAN LAWYERS MAGNIFIES THE COLLATERAL DAMAGE CAUSED BY THE FCPA

As noted above, Brazil is widely perceived to be highly corrupt, but other data sources give researchers reason to question the validity of that perception. In spite of the conflict between different measures, perception data is frequently discussed and disseminated as though it were a measure of corruption rather than corruption perception — producing confusion among many consumers of this information.<sup>147</sup> Recent scholarship has suggested that corruption perception data is systematically biased and is not a valid measure for actual corruption levels.<sup>148</sup> This is troubling because many lawyers are among those who have disregarded the distinction between perception and reality, and are advising business clients to use the CPI to gauge comparative corruption risk between nations.<sup>149</sup> This statistical problem implicates a larger literature critical of the FCPA's effect on business — and suggests that the American approach to anti-corruption

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144. See, e.g., Transparency Int'l, *Global Corruption Barometer 2010/11*, <http://gcb.transparency.org/gcb201011/results/> (placing Brazil in the same category as countries that are perceived as having far lower levels of corruption such as the United States, United Kingdom, and Canada).

145. See, e.g., Donchev, *supra* note 118, at 8–10.

146. *Id.* at 21 tbl.1 (listing ICVS data from 1996, but not from 2000).

147. Abramo, *supra* note 143, at 3.

148. See *infra* Part IV.1.

149. See *infra* Part IV.2.

enforcement may lead some companies to avoid doing business in countries that are perceived to be more corrupt than other corruption metrics suggest.<sup>150</sup>

#### 1. THE INSUFFICIENCY OF EXISTING MEASURES FOR CORRUPTION

Recent research has given scholars good reason to question the construct validity of corruption perception data as a measure for actual corruption.<sup>151</sup> Though replacing corruption perception with concrete experience-based measures would solve some of the more glaring problems with ranking corruption based on the aggregation of opinions, it is also not an entirely satisfactory measure for corruption. No existing measure for corruption is suitable for scaling country risk in the creation of anti-corruption compliance programs.

Corruption perception data has been criticized as inconsistent with experiential data.<sup>152</sup> Indeed, some authors assume that concrete experiences of corruption are a more reliable measure than surveys on how corrupt a group of American experts consider a country to be.<sup>153</sup> These authors suggest that the low correlation between expert assessments and experiential data “might be taken as a sign that experts have a quite coherent set of beliefs about the incidence of corruption that bears little resemblance to realities on the ground.”<sup>154</sup> Various reasons have been given to prefer experience based proxies over perception based proxies. Several of these criticisms are particularly persuasive with regards to Brazil and other similarly situated developing economies. First, corruption perception data has been criticized for reflecting a Western ideological bias among respondents — skewing perceptions of corruption upwards in countries that are

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150. See *infra* Part IV.3.

151. See Donchev, *supra* note 118, at 3–5 (discussing generally the various criticisms of corruption perceptions data).

152. See generally Treisman, *supra* note 121, at 219.

153. See *id.* at 217.

154. Daniel Treisman does not endorse the conclusion that the inconsistency between perceptions and corruption, in itself, indicates that perceptions data is flawed since this would be subject to the same criticism legitimately made against those who over-rely on perceptions data; that one should not blindly assume a proxy is a valid measure for the real thing. See *id.*; see, e.g., Abramo, *supra* note 1143, at 3–4 (“[R]eporting instances of bribery provides a presumably objective assessment of the actual incidence of corruption among populations” without justifying the assumption that experiential statistics provide an unbiased measure of actual corruption).

culturally different from that of the respondents.<sup>155</sup> This gives an especially strong reason to question the validity of perception data on Brazil, which is not generally perceived to be a part of the Western world.<sup>156</sup> Second, research has found that perceptions of corruption are influenced by the total number of corruption episodes — causing larger countries to be perceived as more corrupt.<sup>157</sup> Because of this, corruption perception data for Brazil is particularly likely to be inflated in relation to actual corruption as a percentage of total political and business activity.<sup>158</sup> Third, cultural factors such as longstanding Protestant traditions, a history of democracy, and centralized government all distort the perception of corruption downward with relation to other corruption proxies.<sup>159</sup> This also gives this researcher reason to believe that corruption perception data is particularly likely to be unreliable in measuring Brazil's actual corruption in light of the country's strong Catholic, native, and African religious history,<sup>160</sup> recent transition to democracy,<sup>161</sup> and federalist system.<sup>162</sup> Finally, some respondents might have longstanding perceptions of a nation's corruption that persist regardless of national changes, which is problematic in Brazil because of its recent transition from military rule to democracy.<sup>163</sup>

Other difficulties presented by the use of corruption perception data include the problem of differing cultural perceptions, since different definitions and opinions of "corruption" between countries make perception scores between

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155. See Treisman, *supra* note 121, at 211–15.

156. See DAVID J. HESS & ROBERTO DA MATTA, *THE BRAZILIAN PUZZLE: CULTURE ON THE BORDERLANDS OF THE WESTERN WORLD 2* (1995) ("Brazil is something else, something different from the United States, Canada, and the societies of Western Europe. It is a country where Western culture has mixed and mingled with non-Western cultures for centuries.").

157. See Donchev, *supra* note 118, at 2.

158. Nathan Vardi, *How Federal Crackdown on Bribery Hurts Business and Enriches Insiders*, *FORBES MAGAZINE*, May 24, 2010, available at <http://www.forbes.com/forbes/2010/0524/business-weatherford-kbr-corruption-bribery-racket.html>.

159. See Donchev, *supra* note 118, at 2.

160. SHAWN BLORE & ALEXANDRA DE VRIES, *FROMMER'S BRAZIL 20* (2010) (noting that the growing number of Protestants in Brazil is a recent phenomenon).

161. See generally THOMAS E. SKIDMORE, *THE POLITICS OF MILITARY RULE IN BRAZIL 1964–85* 256–303 (1988).

162. DAVID SAMUELS, *AMBITION, FEDERALISM, AND LEGISLATIVE POLITICS IN BRAZIL* 79–110 (2003).

163. See Donchev, *supra* note 118, at 3–5.



countries impossible to meaningfully compare.<sup>164</sup> Historical and economic factors also influence the perception of corruption, meaning that corruption perceptions measure many factors totally unrelated to actual corruption.<sup>165</sup> Furthermore, different levels of sensitivity to corruption among different cultural groups can result in statistical distortion that paradoxically makes populations that are more sensitive to and critical of corruption appear more corrupt.<sup>166</sup> Superior anti-corruption enforcement might also, ironically, increase the perception of corruption by revealing plots that would not influence corruption perception if they remained secret.<sup>167</sup> Also, the vast majority of respondents in perception surveys lack direct experience with corruption in the countries they are asked to compare, so their responses are often not supported by any substantial evidence but are instead purely “attitudinal.”<sup>168</sup> Cultural variance in the acceptability of criticizing governments may vary widely, further confounding attempts to treat corruption perception as an indicator of actual corruption.<sup>169</sup>

As a result of these, and other serious methodological and theoretical problems with corruption perception data, many scholars, including a former researcher for Transparency International have admitted that the CPI needs to be radically revised to be a valid measure for comparative corruption.<sup>170</sup> All this is not to say that corruption perception data is useless,<sup>171</sup> only that it is completely unsuited to transnational comparisons of actual corruption levels.<sup>172</sup> These criticisms of

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164. See Marcus J. Kurtz & Andrew Schrank, *Growth and Governance: Models, Measures, and Mechanisms*, 69 J. POL. 538, 543 (2007).

165. See *id.*

166. Donchev, *supra* note 118, at 8.

167. See *id.* at 2–10.

168. See *id.* at 4.

169. *Id.* at 8.

170. Fredrik Galtung, *Measuring the Immeasurable: Boundaries and Functions of (Macro) Corruption Indices*, in MEASURING CORRUPTION 101, 124 (Charles Sampford et al. eds., 2006).

171. Treisman, *supra* note 121, at 220 (examining how there is still reason to study perceived corruption indexes even though they do not measure the actual frequency of corruption, because for some types of research perceptions are independently important).

172. *Id.* at 217–20 (noting that research disputing the construct validity of corruption perceptions as a measurement for corruption calls into question the use of perception data as a factor in the award of American development grants).

corruption perception data have not deterred the majority of international investors, development assistance programs, or academics from relying on the data in their attempts to evaluate the quality of governance in developing countries.<sup>173</sup> Some academics simply assume that “perceptions are commonly a good indicator of the real level of corruption,” as if they had compared perception statistics to some independent estimate of the “real level” of corruption.<sup>174</sup> Politicians have suggested forming government policy, including the distribution of development aid, based on a preference for countries perceived to have low levels of corruption.<sup>175</sup> As argued below, one of the worst offenders in the misinterpretation of corruption perception data is the legal profession.<sup>176</sup>

Authors have devised various creative solutions to the problem of measuring the problem of corruption. One promising approach is to compare the expert-estimated cost of public engineering projects with the actual price tag.<sup>177</sup> Unfortunately, to date, this methodology has not been applied to Brazil, or indeed on any kind of scale that would allow it to be used to compare corruption levels between nations. Another interesting solution to the problem of measuring corruption has been to conduct surveys of the international businesspeople who actually give bribes.<sup>178</sup> However, this data is probably biased by the self-interest of respondents,<sup>179</sup> and has been limited to small geographic regions, limiting its value for cross-national comparison.<sup>180</sup> Another study compares countries to

173. CHRISTINE ARNDT & CHARLES OMAN, *USES AND ABUSES OF GOVERNANCE INDICATORS* Ch. 3 (Org. for Economic Co-operation and Dev. Ctr. 2006).

174. Abramo, *supra* note 143, at 3–4.

175. *Id.* at 4 n.5.

176. *See infra* Part IV–2 and accompanying text.

177. *See* Miriam A. Golden & Lucio Picci, *Proposal for a New Measure of Corruption, Illustrated with Italian Data*, 17 *ECON. & POL.* 37, 37 (2005) (“[Comparing] amounts of physically existing public infrastructures and the amounts of money cumulatively allocated by government to create these public works . . . [to identify where] money is being lost to fraud, embezzlement, waste, and mismanagement . . .”).

178. *See* George R.G. Clarke & Lixin Colin Xu, *Privatization, Competition, and Corruption: How Characteristics of Bribe Takers and Payers Affect Bribes to Utilities*, 88 *J. OF PUB. ECON.* 2067, 2068 (2004) (combining firm-level data in twenty-one countries to define characteristics of enterprises that do and do not pay bribes and identify nation-based characteristics).

179. Kurtz, *supra* note 164, at 540–48.

180. Donchev, *supra* note 118, at 3.

determine where the greatest number of fines have been paid for violations of the FCPA.<sup>181</sup> The authors who produce that data, though, seem to understand that they have not produced a measure of corruption because of biases that may influence the total number of FCPA fines in a given country.<sup>182</sup>

Studies that replace the proxy of corruption perception with the proxy of corruption experience reduce problems related to Western bias and cultural differences. Instead of asking about general perceptions of bribery it measures the frequency of a concrete event that is interpreted as an experience with government corruption. However, the weakness of this approach for anti-corruption compliance is that it equates petty bribery of police officers and bureaucrats to high-level corruption among government officials and businesspeople.<sup>183</sup> Though it could be argued that every different manifestation of corruption experienced by members of each social strata are all generated by some central core set of cultural and institutional problems, this hypothesis has not yet been proved by any of the authors whose studies implicitly rely upon it.<sup>184</sup> Therefore, no existing methodology for the measurement of corruption is completely satisfactory for the legal profession's anti-corruption compliance needs.

## 2. THE LEGAL PROFESSION'S MISUSE OF CORRUPTION PERCEPTION DATA

It has been said that "most lawyers went to law school because they did not like math as a subject."<sup>185</sup> It is therefore unsurprising that some lawyers overlook the intricacies of the statistical debate over measuring corruption and instead endorse the use of perception data for FCPA compliance purposes. The popularity of corruption perception data in the

181. *Where the Bribes Are: Penalties in U.S. Government FCPA Cases Since 1977*, JAMES MINTZ GROUP, <http://fcmap.com/> (last viewed Oct. 2, 2012).

182. Joe Palazzolo, *Where the Bribes Are*, WSJ LAW BLOG (Nov. 16, 2011), <http://blogs.wsj.com/law/2011/11/16/where-the-bribes-are/> (quoting Jim Mintz, founder and president of the organization that created the map of FCPA enforcement, saying the purpose of the map was to create "a stark way of showing the risks of bribery").

183. Donchev, *supra* note 118, at 12.

184. *See, e.g., id.*

185. Paul J. Lesti, STRUCTURED SETTLEMENTS § 9:20 (2d ed. 2009); *see also* Elie Mystal, *Non-Sequiturs: 05.22.12*, ABOVE THE LAW (May 22, 2012), <http://abovethelaw.com/2012/05/non-sequiturs-05-22-12/> ("[I]f these judges and attorneys were good at math, they wouldn't have gone to law school in the first place.").

legal community is exemplified by a recent Council of Foreign Relations corporate program meeting where one international law partner felt the need to give a “shout-out” to Transparency International for creating the CPI.<sup>186</sup> Lawyers advise businesses subject to the FCPA to consult corruption perception data without warning them about the distinction between corruption perception and actual corruption or otherwise discussing the limitations of the data.<sup>187</sup> One international lawyer and former U.S. Attorney said “Transparency International’s report is useful in evaluating the playing field around the world in terms of ethical business practices.”<sup>188</sup> A recent article went so far as to claim that “TI and other web-based reports by groups and law firms focusing on the FCPA also assist firms in gauging the extent of the risk of corruption

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186. Lanny A. Breuer, Assistant Attorney General, Criminal Division, Dep’t of Justice, International Criminal Law Enforcement: Rule of Law, Anti-Corruption, and Beyond, Address at Council on Foreign Relations Corporate Program Meeting (May 4, 2010), transcript available at <http://www.cfr.org/international-law/international-criminal-law-enforcement-rule-law-anti-corruption-beyond/p22048>.

187. See, e.g., Santiago A. Cueto, *2009 Corruption Perception Index Released: Can You Guess Where The U.S. Ranked?*, INT’L BUS. L. ADVISOR (Nov. 17, 2009), <http://www.internationalbusinesslawadvisor.com/2009/11/articles/corporate-governance-2/2009-corruption-perception-index-released-can-you-guess-where-the-us-ranked/>; R. CHRISTOPHER COOK & STEPHANIE CONNOR, JONES DAY, *THE FOREIGN CORRUPT PRACTICES ACT: ENFORCEMENT TRENDS IN 2010 AND BEYOND* (2010), available at <http://www.jonesday.com/files/Publication/f0950ee5-18bb-496f-acfe-662b219a108e/Presentation/PublicationAttachment/ada2352f-00b0-4240-aeef-250a23629ba8/FCPA%20Enforcement%20Trends.pdf> (including a table of CPI data in a publication on avoiding FCPA liability without discussion of the data’s limitations); Christopher T. Marquet, *Avoiding the Pitfalls of the Foreign Corrupt Practices Act*, MARQUET INTERNATIONAL (Mar. 10, 2011), [http://www.marquetinternational.com/pdf/avoiding\\_the\\_pitfalls\\_of\\_the\\_fcpa.pdf](http://www.marquetinternational.com/pdf/avoiding_the_pitfalls_of_the_fcpa.pdf) (last visited Oct. 2, 2012) (noting that while Mr. Marquet is not himself a lawyer he is included in this list because he provides due diligence and litigation support services and is a non-lawyer member of the Massachusetts Bar Association). But see GIBSON DUNN, *DO RANKINGS MATTER? TRANSPARENCY INTERNATIONAL ISSUES ITS 2010 CORRUPTION PERCEPTIONS INDEX* (Nov. 16, 2010) (acknowledging the possibly misleading nature of corruption perceptions scores but underscoring the fact that in spite of the problems with the data the CPI is still the most commonly used measure of corruption and that businesses compliance evaluators calculate risk assessments using the CPI).

188. Interview by Global Atlanta with Greenberg Traurig, Former U.S. Attorney, Global Atlanta (August 19, 2010), <http://www.gtlaw.com/NewsEvents/MediaCoverage?find=138561>.

problems they will encounter doing business abroad.”<sup>189</sup> Even scholars who still favor the limited use of corruption perception data agree that corruption perception data cannot form a valid basis for a transnational comparison of actual corruption and that attempting to do so is a serious misuse of the resource.<sup>190</sup> The endemic misuse of corruption perception data in the legal community underscores the legal profession’s need for a better tool for evaluating and comparing country corruption compliance risk. At a minimum, lawyers must understand and explain the limitations of existing corruption data before advising clients to use it for FCPA compliance purposes.

### 3. THE FCPA AS AN “ECONOMIC SANCTION” ON DEVELOPING COUNTRIES AND THE PROBLEM OF CORRUPTION PERCEPTION DATA

A business leader, discussing anti-corruption regulations, stated that, “It’s very, very difficult to distinguish between the potential for corruption (or corruption risk) and actual corruption.”<sup>191</sup> This comment is suggestive of this article’s thesis: It is hard for business leaders to measure actual corruption, so their adversity to potentially massive FCPA liability risk induces them to avoid business in countries that are seen as corrupt.<sup>192</sup> American businesspeople in corrupt markets are forced to either violate the FCPA and face potential prosecution or behave ethically and lose business to Chinese or Russian competitors whose governments do not punish companies for acts of overseas bribery.<sup>193</sup> University of Chicago–Kent College of Law Professor Andrew Spalding argues that the FCPA deters American companies from investing in developing countries, making it essentially function as an economic sanction.<sup>194</sup> This note builds on

189. Cherie O. Taylor, *The Foreign Corrupt Practices Act: A Primer*, 17 INT’L TRADE L.J. 3, 3 (2008).

190. Arndt, *supra* note 173, at ch. 3.

191. DOW JONES RISK & COMPLIANCE, DOW JONES STATE OF ANTI-CORRUPTION COMPLIANCE SURVEY 9 (2011), *available at* [http://www.dowjones.com/pressroom/SMPRs/DowJonesStateofCorruptionSurvey\\_000.swf](http://www.dowjones.com/pressroom/SMPRs/DowJonesStateofCorruptionSurvey_000.swf).

192. Vardi, *supra* note 158.

193. *Id.*

194. *See generally*, Spalding, *supra* note 22 (noting that the FCPA deters desirable investment from countries like the United States in countries where bribery is perceived to be common).

Spaulding's work;<sup>195</sup> it finds that the distinction between corruption perception and reality shows that businesses are not only deterred from investing in countries that are actually corrupt—they are also deterred from countries that are merely perceived to be corrupt. Such analysis supports the addition of a compliance defense to the FCPA. If the FCPA is indeed to be understood as an economic sanction, it must be seen as a particularly irrational sanction because it punishes countries for simply being perceived as corrupt while reducing investment in countries that would otherwise be promising markets for American businesses. This analysis also implies that Transparency International and legal professionals that use their data need to do a better job of clarifying the limitations of the data and encourage the development of new corruption measures.

Spaulding traces the roots of his theory to a statistical analysis performed about twenty years after the passage of the FCPA. This analysis found that when the FCPA took effect, United States business in countries believed to be corrupt showed “unusual declines,” and that post-FCPA American investment grew more rapidly in countries believed to be less corrupt.<sup>196</sup> This study also found that there was no general drop in international business in these countries believed to be corrupt, suggesting that when American companies pulled back because of FCPA fears, they were replaced by “black knights”—firms from countries that do not punish their own companies for acts of overseas bribery.<sup>197</sup> Spaulding also argues that more recent empirical work has confirmed the thesis that anticorruption legislation deters businesses from investing in countries perceived to be corrupt.<sup>198</sup> This statistical observation has been explained by the fact that some companies see bribery

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195. Unlike the legal professionals criticized above for treating the CPI like a tool that can be used to compare actual corruption, Spaulding always carefully referred to “perceived corruption” in his work—but he never explored the potential implications of this distinction for his research. *See generally, id.*

196. *Id.* at 372 (citing James R. Hines, Jr., *Forbidden Payment: Foreign Bribery and American Business After 1977* (Nat'l Bureau of Econ. Research, Working Paper No. 5266, 1995), available at <http://www.nber.org/papers/w5266.pdf>).

197. *Id.* at 372, 392 (citing James R. Hines, Jr., *Forbidden Payment: Foreign Bribery and American Business After 1977* (Nat'l Bureau of Econ. Research, Working Paper No. 5266, 1995), available at <http://www.nber.org/papers/w5266.pdf>).

198. *Id.* at 371–72 (citing Alvaro Cuervo-Cazurra, *Who Cares About Corruption?*, 37 J. INT'L BUS. STUD. 807, 814 (2006)).

as the cost of doing business in environments that they perceive to be corrupt, and believe that it may be hard to design an FCPA compliance program that can guarantee that no company agents will engage in unapproved acts of corruption.<sup>199</sup> Spaulding suggests that because developing markets are generally perceived to be more corrupt than developed ones, the FCPA deters foreign investors from infusing these economies with needed capital investments.<sup>200</sup>

Recent surveys of business leaders support the statistical analysis cited by Spaulding. A survey of 214 executives whose companies are subject to anti-corruption legislation found that 32% of United Kingdom respondents and 25% of United States respondents acknowledge that not doing business in corrupt countries is a way of avoiding the risk for liability in these areas of the world.<sup>201</sup> The 2011 Dow Jones State of Anti-Corruption Compliance Survey, which surveyed more than 300 companies worldwide, found that more than 55% of companies delay or avoid working with global business partners due to the fear of liability of corruption in foreign markets.<sup>202</sup>

The difference between perception and experience based corruption data above suggests the FCPA may function not only as a sanction on actually corrupt countries but also on countries that are merely perceived to be corrupt. Brazil is perceived to be far more corrupt than experience based measures suggest. The existence of countries with mixed corruption indicators demonstrates that at times, the distinction between perception and reality may lead some business leaders to avoid investing because they believe the FCPA enforcement risk in a given nation to be higher than it really is. This gives further support to Spaulding's criticism of the FCPA because it indicates that if the FCPA should be viewed as an economic sanction, it needs to be understood as a poorly aimed sanction that punishes countries based only on their reputation for corruption instead of any concrete evidence.

The sanction effect hypothesized in this article has

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199. Gregory M. Lipper, *Foreign Corrupt Practices Act and the Elusive Question of Intent*, 47 AM. CRIM. L. REV. 1463, 1479 (2010).

200. See, e.g., Spaulding, *supra* note 22, at 373–74.

201. Press Release, KPMG, Majority of U.S. and U.K. Executives Say Corruption Still Hampers Ability To Expand, Do Business In Some Countries, (April 7, 2011) *available at* <http://www.kpmg.com/be/en/issuesandinsights/articlespublications/press-releases/pages/04072011-e.aspx>.

202. See COOK, *supra* note 187, at 2.

interesting policy implications for Brazilian lawmakers. As previously noted, “black knights” like China and Russia are generally thought to fill any gaps left by American businesses that are too risk-averse to invest in countries perceived to be corrupt.<sup>203</sup> Some Brazilian policymakers might consider it tempting to let Chinese investors fill the gap left by American businesses too afraid of FCPA liability to invest in Brazil, but the undervalued Yuan, a growing trade deficit, and competition for the manufactured goods market in Latin America, among other economic issues indicate that if Brazil over-relies on Chinese investment that it will do so to its own detriment.<sup>204</sup> As a result, Brazilian policymakers should consider the reduction of the appearance of corruption to be critical in order to promote economic growth. In Luis Eduardo Suarez’s fictional but verisimilar book about police in Rio de Janeiro, *Elite da Tropa*,<sup>205</sup> the Secretary of Public Safety tells a journalist who is about to publish a story about police corruption: “[T]hat’s life. Especially public life. It’s not enough to be honest, my friend, you have to appear honest as well.”<sup>206</sup> Brazilian policymakers should take the fictional Secretary’s words to heart, and pass tough anti-corruption laws in an attempt to re-adjust international corruption risk perceptions. Advanced legal systems with relatively low levels of perceived corruption consider the reduction of the appearance of corruption to be an important policy goal.<sup>207</sup> This research suggests that Brazilian policymakers should do more to reduce the appearance of corruption to supplement their existing fight against actual corruption.

The sanction hypothesis advanced in this article has the

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203. See Spalding, *supra* note 22, at 397.

204. CARLOS PEREIRA & JOÃO AUGUSTO DE CASTRO NEVES, FOREIGN POLICY AT BROOKINGS, POLICY PAPER NO. 26, BRAZIL AND CHINA: SOUTH-SOUTH PARTNERSHIP OR NORTH-SOUTH COMPETITION? 3–7 (March 2011), available at [http://www.brookings.edu/~media/research/files/papers/2011/4/03%20brazil%20china%20pereira/03\\_brazil\\_china\\_pereira.pdf](http://www.brookings.edu/~media/research/files/papers/2011/4/03%20brazil%20china%20pereira/03_brazil_china_pereira.pdf).

205. Peter Sciretta, ‘Elite Squad 2’ is a Must See Crime Thriller [Sundance Review], SLASH FILM, (Jan. 27, 2011), <http://www.slashfilm.com/elite-squad-2-sundance-review/> (describing *Elite Squad: The Enemy Within*, as “a cross between *The Departed*, *The Wire*, and *The Godfather*.”).

206. LUIZ EDUARDO SOARES ET AL., *ELITE SQUAD* 289 (Clifford E. Landers trans., 2008).

207. See, e.g., *Buckley v. Valeo*, 421 U.S. 1, 96 S. Ct. 612, 638 (1976) (“Of almost equal concern as the danger of actual quid pro quo arrangements is the impact of the appearance of corruption . . .”).



greatest implications for lawmakers in the United States, given the growing importance that countries like Brazil have to the world economy. Brazilians have long repeated the mantra that Brazil is the country of the future, because its vast territory,<sup>208</sup> large population,<sup>209</sup> and an ample supply of natural resources<sup>210</sup> give it a staggering economic potential. In recent years it has become cliché for commentators discussing Brazil to claim that the future has arrived.<sup>211</sup> Even in the context of the country's relatively slow growth in 2012,<sup>212</sup> these claims do not seem out of place given Brazil's recent advances,<sup>213</sup> discovery of massive offshore oil fields,<sup>214</sup> and the revenues expected when Brazil hosts the World Cup in 2014 and the Olympic Games in 2016.<sup>215</sup> Though some commentators have urged restraint in

208. WERNER BAER, *THE BRAZILIAN ECONOMY: GROWTH AND DEVELOPMENT* 5 (6th ed. 2009) (noting that Brazil has the fifth largest land mass of any county in the world, making up 47% of South America).

209. Brazil's population of more than 200 million inhabitants is the fifth largest in the world. CENTRAL INTELLIGENCE AGENCY, *THE WORLD FACTBOOK: BRAZIL* (2011); see also, BAER, *supra* note 208, at 7; see, e.g., Charles W. Cookson II, *Long-Term Direct Investment in Brazil*, 35 U. MIAMI INTER-AM L. REV. 345, 347-48 (2004) (arguing that Brazil's large consumer market makes it an attractive market for foreign investment).

210. BAER, *supra* note 208, at 3-6 (noting that Brazil has long been an agricultural powerhouse and had a strong mining industry); see also, Matt Moffett, *Brazil Joins Front Rank of New Economic Powers*, WALL ST. J., May 13, 2008, at A1, available at <http://online.wsj.com/article/SB121063846832986909.html>.

211. See, e.g., Tom Phillips, *The Country of the Future Finally Arrives*, THE GUARDIAN, May 9, 2008, available at <http://www.guardian.co.uk/world/2008/may/10/brazil.oil>; Jeffery Simpson, *The Country of the Future May Finally be Arriving*, THE GLOBE AND MAIL, Feb. 22, 2010, available at <http://www.theglobeandmail.com/news/opinions/the-country-of-the-future-may-finally-be-arriving/article1477427/>.

212. Brian Winter and Silvio Cascione, *Update 3-Brazil Economic Recovery in Doubt After Weak 2<sup>nd</sup> Qtr*, Reuters (Aug. 31, 2012) <http://www.reuters.com/article/2012/08/31/brazil-economy-idUSL2E8JV1ZM20120831>.

213. Luciana Lopez & Silvio Cascione, *Brazil Economy Surges in 2010; Growth Seen Cooling*, REUTERS (Mar. 3, 2011), <http://www.reuters.com/article/2011/03/03/us-brazil-economy-idUSTRE7222QZ20110303>.

214. Simon Romero, *New Fields May Propel Americas to Top of Oil Companies' Lists*, N.Y. TIMES, Sept. 19, 2011, at A1, available at <http://www.nytimes.com/2011/09/20/world/americas/recent-discoveries-put-americas-back-in-oil-companies-sights.html>.

215. David Robinson, *Brazil: Special Report: Growth and Opportunity*, THE CHAMBERS MAGAZINE, (Issue 30, 2009), available at <http://www.chambersmagazine.co.uk/Article/Brazil-Special-Report-Growth-and-Opportunity>.

the evaluation of emerging markets such as Brazil,<sup>216</sup> even cautious and skeptical analysis suggest a positive outlook for Brazil's economy.<sup>217</sup> Furthermore, the Goldman Sachs report cited above indicates that the BRIC countries (Brazil, Russia, India, and China) are considered to have sufficient growth potential to overtake more mature economies in the coming decades.<sup>218</sup> The Goldman analysts argue that new economic realities are being created by the rise of the BRICs and that governments and firms in the developed world ought to take note and invest accordingly.<sup>219</sup> According to this note, the FCPA actually creates fear of investing in these developing countries. This is particularly harmful to the United States because it denies important investment opportunities for American businesses. If, as the Goldman report suggests, American investors need to pursue opportunities in the BRICs — then American government policy should reflect that need by eliminating artificial barriers between its businesses and best new prospects for increased profits. While American business is certainly seeing growth in Brazil, my research may suggest that existing investment levels are lower than they would be without the unnecessary fear induced by FCPA concerns.

Ultimately, this refinement of the sanction thesis bolsters suggestions that the FCPA should be amended to contain an affirmative defense for companies that make a good-faith

216. See, e.g., *Some Like It Hot*, THE ECONOMIST, Jun. 20, 2011, available at <http://www.economist.com/node/18895150>.

217. Andre Soliani & Matthew Bristow, *Brazil, India, China May Be Overheating As Bubbles Emerge*, Roubini Says, BLOOMBERG (May 31, 2010), <http://www.bloomberg.com/news/2010-05-31/roubini-says-brazil-india-china-may-be-overheating-sees-asset-bubbles.html> (quoting Nouriel Roubini, the New York University professor who predicted the global financial crisis as saying that in spite of signs of overheating and possible asset bubbles the outlook for Brazil is “very positive”).

218. DOMINIC WILSON & ROOPA PURUSHOTHAMAN, PAPER NO: 99, DREAMING WITH THE BRICS: THE PATH TO 2050, GLOBAL ECONOMICS (Goldman Sachs 2003), <http://www.goldmansachs.com/our-thinking/topics/brics/brics-reports-pdfs/brics-dream.pdf> (last visited Oct. 2, 2012) (“The size of Brazil’s economy overtakes Italy by 2025; France by 2031; UK and Germany by 2036.”).

219. *Id.* (“As the advanced economies become a shrinking part of the world economy . . . [b]eing invested in and involve in the right markets—and particularly the right emerging markets—may become an increasingly important strategic choice for many firms.”); see also, *The New Champions: Emerging Markets are Producing Examples of Capitalism at its Best*, THE ECONOMIST, Sept. 18, 2008, available at <http://www.economist.com/node/12080711> (last visited Oct. 2, 2012).

attempt to comply with the law. A compliance based affirmative defense does not completely eliminate the market distortion created by anti-corruption legislation because companies doing business in countries believed to be corrupt still need to invest more money into compliance programs than businesses in developed nations.<sup>220</sup> However, the cost of an anti-corruption compliance program is far lower than the harm sustained by an FCPA enforcement action.<sup>221</sup> Even if a compliance defense would not completely solve the sanction problem, it would at least minimize the market distortion created by a law that is meant to deter bribery but in its present form actually deters investment. A compliance defense does not solve the sanction problem, but it certainly ameliorates the issue for developing countries that are perceived to be corrupt.

This research also has important implications for transnational NGOs, such as Transparency International, which should do a better job explaining the limitations of perception-based data and highlight some alternative corruption measures to encourage further research. This note suggests that, at a minimum, American lawyers need to stop advising clients to calibrate anti-corruption compliance programs based on perception data and communicate more of the limitations of perception data to clients engaging in FCPA compliance risk calculations.

## V. CONCLUSION

The last few years were the first time in history that a country meaningfully threatened its own businesspeople with criminal liability for overseas bribery. The United States was the first major power to take such a step, and the legislation it produced was historic but flawed. The absence of an affirmative defense for compliance and the impossibility of implementing a perfectly effective anti-corruption program have made it very important for companies to accurately predict which regions, countries, or industries will create the greatest temptations for

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220. See *supra* Part II-2 (noting that anti-corruption compliance programs should be proportional to the risk encountered in the business environment).

221. Leslie McCarthy, CORPORATE COMPLIANCE INSIGHTS, SETTING THE FCPA COMPLIANCE STANDARD: PRINCIPLES AND PRACTICES FOR AN EFFECTIVE GLOBAL THIRD-PARTY DUE DILIGENCE PROGRAM (Aug. 20, 2009), <http://www.corporatecomplianceinsights.com/2009/whitepaper-fcpa-compliance-standards-global-third-party-due-diligence-program/> (last visited Oct. 2, 2012).

their agents to engage in bribery. Unfortunately it is impossible to accurately measure corruption itself, and the most popular proxy to date is the aggregation of a number of surveys of opinions. The aggregation of opinion is still nothing more than opinion — and in this case there is little observed correspondence between perception and reality. In spite of these flaws some members of the legal profession have wholeheartedly endorsed the use of perception data for anti-corruption compliance, which is problematic since existing data suggests that some companies completely avoid countries that they perceive to be an anti-corruption compliance risk.

Non-perception based data suggests that Brazil may be a country where there is a particularly wide disjuncture between perception and reality on the issue of corruption. Essentially, this means that Brazil might be the innocent bystander struck by the crossfire between the United States and foreign corruption. However, it also means that the United States could be hurting itself because it is creating a disincentive for its own businesses to invest in highly promising markets. The addition of a compliance defense to the FCPA is desirable, since it would alleviate both problems. Until American lawmakers follow the British lead and make good-faith attempts to comply with the law an affirmative defense to FCPA charges, the legal profession needs to do a better job of explaining the limits of statistical measures of corruption to clients calibrating their global compliance programs.